No. 13934

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge*

HENDERSON, CARNAHAN, THOMPSON & GORDON,
HARRY SAGER,

Attorneys for Appellant.

Office and Post Office Address:
1410-24 Puget Sound Bank Building
Tacoma, Washington.

FILED

LORIMER I. LANGLOW, PRINTER, TACOMA, WASHINGTON

JAN - 4 1954

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JURISDICTION

The defendant was charged in the District Court for the Territory of Alaska, Third Division, by an indictment alleging an assault with a dangerous weapon in violation of Section 65-4-22, Alaska Compiled Laws Annotated, 1949 (Tr. 3). Jurisdiction in the District Court was by virtue of 48 U. S. C. 101 and 103.

After trial to a jury a verdict of guilty was entered on March 5, 1953 (Tr. 64). A written judgment and sentence was entered on March 18, 1953 imposing a term of imprisonment of 2½ years (Tr. 24). Notice of Appeal was filed on March 19, 1953 (Tr. 25). This Court has jurisdiction of the appeal by authority of 28 U. S. C. 1291 and 1294(2).

STATEMENT OF THE CASE

The indictment alleged that on July 16, 1952 in the Third Judicial Division, Territory of Alaska, the defendant being then and there armed with a dangerous weapon, to-wit, a revolver, did then and there assault one Paul Abernathy by pointing said gun at said Paul Abernathy and threatening to do him bodily harm if a drink of intoxicating liquor was not served to the said Paul Abernathy and his companion. (N.B. the Government's evidence showed that the demand upon the bartender was that he serve liquor to the defendant and his wife). The section of the Alaska laws under which the charge was made is as follows:

> "That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the County jail not more than one year nor less than one month, or by fine of not less than $100.00 nor more than $1000.00." ACLA, 1949, §65-4-22.

The trial of this cause was set for March 5, 1953. On February 24, 1953 defendant's then attorneys filed a motion for a continuance of the time of trial (Tr. 5). Said motion was supported by an affidavit of Dr. Walter Scott Brown stating that the defendant had been severely injured in an automobile accident on January 23, 1953, resulting, among other things, in post brain concussion and occasional fainting spells, and expressing the opinion that he was then in no mental state to carry on business affairs (Tr. 5). This motion was denied on February 27, 1953 (Tr. 7).

Again on March 4, 1953, the day before the trial setting, a further motion for continuance was filed (Tr. 7), supported by the statement of Dr. Richard O. Sellers and the affidavit of Stanley McCutcheon (Tr. 8). These supporting documents indicate that the defendant was in no physical or mental condition to proceed to trial. This motion was denied on March 4, 1953 (Tr. 11), and the cause proceeded to trial the following day.

The prosecution produced the following witnesses in support of the charge: Paul Abernathy, the alleged victim (Tr. 39); Patricia Ann Herrick, a young girl present at the time of the alleged assault (Tr. 33); David E. Thompson, a bystander at the time of the alleged assault (Tr. 29); Don F. Howell, the arresting

officer (Tr. 42); and Dr. James E. O'Malley, who purported to testify as an expert witness (Tr. 46).

Paul Abernathy testified that he was a bartender at Keith and Clara's on July 16, 1952; that the defendant came into the barroom with his wife; that they were in and out of the bar once or twice and were pretty drunk (Tr. 39); that the defendant asked for a drink and he refused them; that the defendant again demanded a drink and threatened trouble if it was not served; that the defendant then drew a gun and pointed it at the witness across the bar and he then served them a drink (Tr. 40).

> "Q. Did you think the gun was loaded?
>
> Mr. McCutcheon: Objection. Objected to as an improper question.
>
> The Court: Objection overruled.
>
> Q. Did you answer that question? Did you think the gun was loaded?
>
> A. Yes, Sir; I sure do.
>
> * * * * * *
>
> Q. Did you know whether or not the gun was loaded?
>
> A. I couldn't tell." (Tr. 40).

He further testified that the gun looked like a 25 caliber. He was not positive if it was or not. It was a

small caliber of an automatic type. Also that the defendant pulled the gun from underneath his jacket from some concealed position (Tr. 41).

Miss Herrick was the daughter of the proprietors of the tavern (Tr. 33). She worked there occasionally but not on the day of the assault, although she was present. She observed the defendant pulling a gun on the bartender, at which time she was standing about two feet behind him. She heard the defendant order the bartender to serve a drink.

> "Q. Did you think the weapon was loaded?
>
> A. Yes. I don't know, but I assumed it was the way he was using it. (Tr. 34).
>
> * * * * *
>
> Q. Was no way for you to know whether or not the gun was loaded, was there?
>
> A. No." (Tr. 35).

She further testified that the gun was small, about a two-inch barrel. (Tr. 36).

David E. Thompson testified that he was at Keith and Clara's on the evening of the alleged assault; that it was around 7 P. M. (Tr. 29 and 30). At that time the defendant and a blond woman came into the establishment, they did some talking in a loud voice and had a drink or two. They were arguing about something (Tr. 30). After some period of this the two of

them went to the bar and asked for a drink for the woman. The bartender refused. The defendant said "Are you going to give her a drink or do I have to whip you?" The bartender refused again and the defendant reached under his belt and pulled out a gun. The witness was sitting at the bar to the left of the defendant. He could see plainly what kind of a gun it was. The defendant again demanded a drink and the bartender complied (Tr. 31).

> "Q. Did you think the gun was loaded?
>
> A. As near as I could possibly see, the clip was in it and ready for action. I watched that particularly because I figured on getting that gun myself if there was any possible chance.
>
> Q. You figure the gun was armed and ready to fire?
>
> A. Absolutely; if it hadn't been I would have tried to get it." (Tr. 31).

On cross examination he testified (Tr. 32):

> "Q. Did you see any shells in the gun?
>
> A. There was no possible way you could see any shells in an automatic when the clip is in it. * * *
>
> Q. No possible way for you to tell whether or not it was loaded from where you were standing?
>
> A. Other than the fact that the clip was in it."

He further testified that the gun looked like a 25 caliber (Tr. 32).

Don F. Howell arrested the defendant between 11:30 and 12 o'clock P. M. on the night of the alleged assault (Tr. 42). The defendant's car and person were searched and no small automatic was found. However, a 9 millimeter German type Luger was found in the glove compartment (Tr. 43). Two fingers of the defendant's right hand were wounded at the time and the witness took pictures of the wound (Tr. 43). The defendant told the witness that his hand had been hurt on the tail gate of his truck, which he later learned to be then in Kenai (Tr. 44). The German Luger found in the defendant's truck was not loaded (Tr. 45).

Dr. James E. O'Malley saw the defendant's hand "sometime around the 16th day of July, 1952." The photograph of the hand identified by Howell was of the hand the doctor looked at (Tr. 46).

> "Q. What type of wound is it, Doctor?
>
> Mr. McCutcheon: Just a moment before you answer that, Doctor. Object to the line of questioning that it does not in any way relate to the crime charged. It has absolutely nothing to do with the crime charged. The man is charged with assault with a deadly weapon. Might the objection show that it is an improper question and irrelevant and immaterial.
>
> The Court: For the purpose of showing the

caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.

Mr. Buckalew: That's the purpose of it, your Honor.

The Court: Go ahead.

Q. (By Mr. Buckalew): Did you examine the wound, Doctor?

A. I did.

Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the Deputy Marshall with no history and had me look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25-caliber weapon." (Tr. 46 and 47).

The defendant offered no evidence except to re-call the Government's witnesses, Thompson (Tr. 49) and Herrick (Tr. 56), and cross examine them in further detail.

ASSIGNMENTS OF ERROR RELIED ON

1. The Court erred in denying defendant's motion for trial continuance.

2. The Court erred in admitting testimony of witnesses David E. Thompson (Tr. 31) and Patricia Ann Herrick (Tr. 34) that they thought the gun was loaded.

3. The Court erred in admitting over defendant's objection the testimony of Dr. James E. O'Malley concerning the caliber of the bullet which inflicted the wound in defendant's hand (Tr. 46 and 47) on two grounds:

(a) The witness was not qualified as a balistics expert;

(b) The testimony of the witness (Tr. 47) is not a statement of opinion.

4. The Court erred in submitting to the jury the charge of assault with a dangerous weapon since there was no sufficient evidence that the gun was loaded.

5. The Court erred in its instructions:

(a) In failing to give defendant's requested Instruction No. 1;

(b) In failing to adequately instruct the jury as to the distinction between assault with a dangerous weapon and simple assault;

(c) In failing to instruct on circumstantial evidence.

As to (a) and (b) the defendant took exceptions. (Tr. 62).

ARGUMENT

Assignment of Error No. 1:

The Court erred in denying defendant's motion for trial continuance.

The question of granting a continuance of trial is a matter almost entirely within the discretion of the trial Court. It will be considered on appeal only for obvious abuse of that discretion.

Wolfe v. U. S., 64 Fed. (2) 566 (9th C.C.A.).
LaFeber v. U. S., 59 Fed (2) 588.
Vanse v. U. S., 53 Fed (2) 346.

With full recognition of this rule, however, it seems to us the lower Court should have granted a continuance. The two written motions (Tr. 5 and 7) and the oral motion at the commencement of the trial (Tr. 27) were supported by a substantial showing of the mental and physical disability of the defendant and his inability to testify or effectively defend himself. There was no controversion of this showing and yet the trial Court summarily denied the motions.

Assignment of Error No. 2:

The Court erred in admitting testimony of the witnesses David E. Thompson (Tr. 31) and Patricia Ann Herrick (Tr. 34) that they thought the gun was loaded.

The testimony to which this assignment is directed appears verbatim ante, pages 5 and 6. In each

instance the witness was permitted to testify that they thought the gun was loaded despite their other testimony that there was no way for them to know whether or not it was loaded, to-wit:

> "Q. Did you see any shells in the gun?
>
> A. There was no possible way you could see any shells in an automatic when the clip is in it." (Thompson's testimony Tr. 32)
>
> Q. Was no way for you to know whether or not the gun was loaded, was there?
>
> A. No." (Miss Herrick's testimony Tr. 35)

It should be noted also that the objectionable testimony was not the result merely of a volunteered statement by the witnesses but that in each instance it was in response to a direct question from the prosecuting attorney as to what the witness *thought*. We emphasize the seriousness of admitting this testimony because, as will be hereinafter shown, the record is devoid of any direct testimony as to the gun being loaded. That the gun was loaded was one of the essential elements requisite to establish the crime charged, namely, assault with a dangerous weapon.

That such testimony is not admissible is established by the following cases:

In *Brown vs. U. S.*, 152 Fed. (2) 138, (C.A.D.C.), the defendant was charged with an indecent assault on

a very young girl. One of the officers testified as to his belief as to what the defendant had done. The Court says at page 139:

> "Without objection, police officers told the jury what the child had said a day or two after the alleged assault and one of the officers expressed a belief as to what appellant had done. As the Municipal Court of Appeals said, the officers' testimony was plainly inadmissible. The admission of such testimony in so serious a case might be enough to require reversal despite the fact that counsel did not object."

Robertson vs. U. S., 171 Fed. (2d) 345, (C.A.D.C.). This involved a charge of forging and uttering a Government check. The victim testified that he observed the defendants after he had cashed the check and "I thought they were arguing over the divvy of the money." The Court says at page 346:

> "It should be noted that Nelligan did not say he saw the defendants divide the money. His testimony was that he saw Robertson pass money to the other man and 'thought they were arguing over the divvy of the money.' Incidentally it may be observed that the quoted part of this testimony, although not objected to, was clearly incompetent and inadmissible."

* * * * *

> "However, we cannot escape the conclusion that in both instances the errors complained of were plain; that the natural and probable influence upon the jury was prejudicial, and that the right of appellant to a fair and impartial verdict of the jury was substantially affected. Under these cir-

> cumstances we are convinced that we should apply Rule 52 (b) of the Federal Rules of Criminal Procedure and take notice of the errors, although they were not brought to the attention of the trial Court. Accordingly the judgment against appellant on the second count of the indictment is reversed."

Girson vs. U. S., 88 Fed. (2) 358 is a case from this court. The trial was upon a charge of concealing stolen government property. The pertinent part of the opinion is under Head Note 9 at page 361. The identity of certain socks alleged to have been stolen was in issue. The defendant attempted to ask a government witness whether certain socks shown the witness were the same as those in evidence. The trial court sustained an objection to this testimony and this court said concerning it at page 361:

> "The ruling of the trial court was correct. The admissibility of the evidence sought to be elicited is determined by the general rule as stated in 11 R.C.L. 565, Sec. 3: '* * * As to conclusions upon matters within the scope of common knowledge and experience, the jury is a tribunal well fitted to perform this task. To permit a witness to state to the jury his opinions as to the conclusions to be drawn from the concrete facts which he has observed would be to invade the peculiar province of the jury; and therefore conclusions of that character are universally excluded. * * *'"

See also this court's opinion in *D'Aquino vs. U. S.*, 192 Fed. (2d) 338, at page 371 under Head Note 61.

In connection with this assignment we expect it to be argued that the error in admitting this testimony

cannot avail the appellant because it was not objected to. It is true, there was no objection. However, it may be noted that when the same question was put to the witness Abernathy, i.e. whether he thought the gun was loaded, the defendant objected and the objection was overruled (Tr. 40).

This Court, though, will notice and consider plain and substantial error even though there was no objection at the trial. See *Robertson vs. U. S.* and *Brown vs. U. S., supra.*

In *Gross vs. U. S.*, 136 Fed. (2) 878 this court sua sponte took notice of the erroneous admission of a confession under the McNabb rule and reversed a conviction although there was no objection to the admission of the confession and no assignment of error upon that ground on the appeal. The Court says at page 880:

> "It is obvious that it is immaterial in a court of justice whether the court sua sponte first recognizes and calls attention to a plain error 'absolutely vital to defendants' and that appellant's counsel then urges it, or that counsel first calls the appellate court's attention to the vital error.
>
> We therefore consider it irrelevant that in the *McNabb* and *Anderson* cases the objection that the confessions were obtained by coercion was made at the trial."

Criminal Rule 52 (b) provides:

> "Plain errors or defects affecting substantial

rights may be noticed although they were not brought to the attention of the Court."

See also *Karrell vs. U. S.*, 181 Fed. (2) 981, 986, (C.A.9) (Head Note 9).

Freeman vs. U. S., 158 Fed. (2) 891, 895, (C.A.9) (Head Note 7).

Assignment of Error No. 3:

The Court erred in admitting over defendant's objection the testimony of Dr. James E. O'Malley concerning the caliber of the bullet which inflicted the wound in defendant's hand, on two grounds: (a) The witness was not qualified as a ballistics expert; (b) The testimony of the witness is not a statement of opinion.

We will first discuss the error indicated in sub (a).

The entire testimony of Dr. O'Malley pertinent to this issue is set forth verbatim at pages 7 and 8 supra.

It will be noted that the doctor did not qualify in any degree as an expert in the field of ballistics—that so far as the record shows he didn't know a 25 caliber from a shotgun. That so far as we or the trial court knew he had never handled a gun nor a cartridge nor a bullet.

It is true that the defendant's trial lawyer waived the doctor's qualifications, but the record (Tr. 46) shows patently that he was only admitting the doctor's

qualifications as a physician or surgeon. Surely the defendant should not be mouse-trapped in this manner. If the District Attorney intended to qualify the witness as an expert in ballistics he should have advised the defendant's attorney when he admitted the doctor's qualifications, obviously only in the realm of medicine.

It would seem only necessary to state the proposition that in the field of expert testimony a witness, by reason of his being a physician and surgeon only, does not qualify him to testify as an expert as to bullets and gun caliber. However, there are cases on the point as well.

In *Wise vs. State*, 11 Ala. App. 72; 66 Southern 128, the defendant was convicted of murder in the second degree. A doctor was examined in behalf of the defendant. The doctor hunted very little and had not had much experience with firearms. An objection to the following question was sustained: "Doctor, from an examination of the wound and the outer garment through which the load passed, how close, in your judgment, was the muzzle of the gun that fired that shot to the body of the deceased at the time of the shot?" In considering this ruling the Court said at page 131:

> "The mere fact that the witness Matheny was a physician did not necessarily, of itself, without more, and when it was not made to appear that he

> had had experience, show him to be qualified as an expert to give his opinion on how close the gun was to the deceased when the shot that caused her death was fired, and the court committed no error in refusing to admit this evidence as competent expert opinion testimony. A witness, to testify as an expert, must first be shown to be such. 6 Mayf. Dig. 344, Sec. 180."

In respect to the testimony of another witness, who apparently was permitted to testify over objection of the defendant, the Court says at page 132:

> "We hardly think the witness J. F. Johnson was shown to have sufficient knowledge on the subject to answer as an expert the hypothetical questions that he was permitted to answer against the objection of the defendant. His experience and observation seemed principally limited to the modern arms used in warfare, and he was shown to have had but little knowledge, if any, of a weapon like the one with which the deceased was killed—a short, single-barreled shotgun. His opinion must necessarily have been based upon a species of knowledge variant from the facts hypothesized, and consequently variant from that knowledge which the law requires as a qualification of one who gives his opinion as an expert."

In *Golson vs. State*, 26 Southern 975 (Ala.), a murder trial, a factual issue arose as to whether a gunshot which pierced a door was fired from the outside or from the inside. The clear necessity for a witness' qualifications as an expert in ballistics is pointed out by the Court at page 978:

> "5. The door through which three shots were fired was exhibited to the jury. Middleton, qualify-

ing as an expert, testified that in his opinion the shots were fired from the outside. McDonald also, examined by the defendant, testified to facts showing he had no expert knowledge on the subject, and stated that he was not an expert. He was asked by defendant for his opinion, whether the person fired the shots through the door, stood on its outside or inside. In the rejection of this evidence, the court did well. The witness knew no more about the matter than the persons composing the jury, and no more than any other ordinary person, not skilled as to the matter inquired about."

Moline vs. New York Life Insurance Company, 148 Kan. 555; 83 Pac. (2) 639. This case was a suit upon the double indemnity provision of an insurance policy for the death by gunshot wound of the insured. With reference to the testimony of doctors the Court says at page 641 of the Pacific Reporter:

"Each of the doctors hereafter mentioned saw and examined the body of the insured. In addition to their medical testimony concerning the competency of which there is no dispute. Dr. Morgan and Dr. Hilbig testified with reference to their personal familiarity with shotguns, the size of a hole the discharge would make at varying distances, the spread of the charge, etc. Dr. Mays stated he was familiar with the operation of shotguns; that he had made no especial study of gun shot wounds or the effect thereof but that he had heard some discussions thereon at clinics and medical meetings; that he had practiced medicine for 26 years and had had occasion as a physician to examine and treat gun shot wounds and powder burns. Dr. Morgan and Dr. Mays were permitted to give their opinions as to the distance the gun was from the head at the time of the discharge."

* * * "The general rule is that the normal function of the witness is to state facts within his personal knowledge, and that ordinarily his opinions and conclusions are not to be received. See 22 C.J. 485, where many Kansas cases are cited. However, it is recognized that a skilled witness is permitted to state facts known to him because of his special knowledge and experience or his inferences therefrom where the matter involved is such that persons without his special knowledge could not observe intelligently or draw correct inferences, although admission of such evidence has been criticized."

See also *Franklin vs. Commonwealth*, 48 S.W. 986,

Dr. O'Malley, having shown no experience with or knowledge of guns or bullets, was wholly unqualified to express an opinion as to the caliber of the bullet which caused the wound observed by him in the defendant's hand.

We now consider sub (b) of this assignment, to-wit, *The testimony of Dr. O'Malley is not a statement of opinion.*

Because of the peculiar nature of this statement of the doctor it is repeated here:

"Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the deputy marshall with no history and had me look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25 caliber weapon."

This statement of the witness is in no sense a statement of his present opinion. It is no more than an assertion of what he told the deputy marshall on a prior occasion out of court and not under oath. The statement is not followed up to elicit whether or not it expressed his present opinion. He does not say "It is my opinion that it was a gunshot wound, probably a 25 caliber weapon," he merely says that is what he told the Marshall at a prior time. So far as its being testimony upon which the jury could base any conclusion or even inference, it has no probative value whatsoever. We make further reference to this testimony in our next Assignment of Error.

Assignment of Error No. 4:

The Court erred in submitting to the jury the charge of assault with a dangerous weapon since there is not sufficient evidence that the gun was loaded.

That a gun which is merely pointed at a victim must be loaded in order to be a dangerous weapon, there can be little argument. This Court has clearly enunciated the rule in *Price vs. U. S.*, 156 Fed. 950. This is an appeal from a conviction of assault with a dangerous weapon in the United States Court for China. The problem is well stated in the following excerpt from this Court's opinion appearing on page 952:

"2. The court found, and there is evidence to justify the finding, that the defendant at the time and place stated in the information, while engaged in an angry altercation with the complaining witness, without justification, and within shooting distance, drew a revolver and pointed it toward the witness in a threatening manner, putting him in such fear that he got under a table for safety. The court also found, and, indeed, the fact is undisputed, that the pistol was unloaded, but this was not known to the complaining witness. We think, upon the facts stated, the judgment of the court, convicting the defendant of the offense of an assault with a dangerous weapon, cannot be sustained. In order to constitute that offense, a dangerous weapon must be used in making the assault. The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon 'is one likely to produce death or great bodily injury.' *U. S. vs. Williams* (C.C.) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it, the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon."

See also the *Annotation in 74 A. L. R. 1206.*

What evidence was there at this trial to establish that the gun was loaded? Each of the three witnesses who saw the assault testified they could not tell if the gun was loaded (Tr. 32, 35 and 40). The prosecution apparently sensed this deficit and therefore attempted to get in some evidence on this vital point through the witness Dr. O'Malley. Up to this point we have these facts: The defendant pulled and pointed a small revolver, apparently a 25 caliber, at the victim about 7 o'clock P. M. Four hours later he was arrested, at which time he had a wound in his right hand. Then we reach Dr. O'Malley's statement. Assuming that it was proper and that it had some probative weight, it could be inferred therefrom that the defendant's hand had been wounded by a gunshot of a 25 caliber. From that inference the prosecution's next step is to infer that the bullet which wounded his hand came from the same gun which he pointed at the bartender. The prosecution next infers that the gun which wounded the defendant's hand had not been loaded at some time between 7 o'clock and 12 o'clock P. M., and finally, therefore, that the gun was loaded at the time of the assault on Abernathy. What a strained link of circumstances and inferences!

We think the foregoing is a fair recital of all the evidence which the jury had with which it could conclude beyond a reasonable doubt that the gun was

loaded. It is doubtful if such testimony even reaches the dignity of being circumstantial evidence. At best it is inference upon inference at least four times removed.

Assignment of Error No. 5:

The Court erred in its instructions: (a) In failing to give defendant's requested instruction No. 1; (b) In failing to adequately instruct the jury as to the distinction between assault with a dangerous weapon and simple assault; (c) In failing to instruct on circumstantial evidence.

We will discuss (a) and (b) of this assignment together. Defendant's requested instruction No. 1 (Tr. 11) which the Court refused to give is as follows:

> "An unloaded gun is not a dangerous weapon when used only as a firearm. The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a dangerous weapon, and cannot sustain a conviction for such an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted, and this, too, regardless of whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear."

Instructions Nos. 1, 2 and 3 of the Court's charge are the only ones in the entire charge which purport to tell the jury the elements of the crime charged and the included offense of simple assault or to distinguish between them. These instructions are as follows:

No. 1

"The indictment in this case charges the defendant with the crime of assault with a dangerous weapon, alleged to have been committed on or about July 16, 1952, near Anchorage, upon Paul Abernathy, by pointing a gun at him and threatening him with bodily harm.

The law of Alaska defines the crime charged as follows:

'That whoever being armed with a dangerous weapon shall assault another with such weapon shall be punished.'

An assault with a dangerous weapon is an unlawful offer, coupled with present ability, to injure another with such weapon. Any pointing of a loaded gun at or toward another in a menacing and threatening manner is sufficient to constitute an assault with a dangerous weapon.

In this connection, you are instructed that a loaded revolver is a dangerous weapon. Whether it was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say."

No. 2

"The essential elements of the crime charged, each of which must be proved beyond a reasonable doubt before the defendant may be convicted, are:

(1) An assault, and

(2) With a dangerous weapon

It is undisputed that the crime, if committed, was committed at or about the time and place charged. Therefore, if you find from the evidence beyond a reasonable doubt that at or about the time and place charged, the defendant made an assault with a loaded revolver upon Paul Abernathy by pointing it at or toward the said Abernathy in a threatening or menacing manner, you should find him guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him."

No. 3

"Included in the crime charged in the indictment is the crime of simple assault.

Simple assault is defined as:

'Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, shall be punished.'

Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that the said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

You are also instructed that if you find that an assault was committed but are in doubt whether it was an assault with a dangerous weapon or merely simple assault, you should convict the defendant of the lower grade of offense, that of simple assault." (Tr. 12 to 14).

The defendant excepted to the failure of the Court to give his requested instruction No. 1 and to the in-

adequacy of the court's charge on this point, in the following language: (Tr. 62).

> "MR. McCUTCHEON: The defendant excepts to the failure of the Court to include Defendant's Instructions 1 and 2, contend that it is in the [isn't] clear with the Court's instructions as given. An unloaded gun is not a dangerous weapon within the meaning of the statute in the light of the testimony given."

We think the instruction requested by the defendant, as set out above, is an excellent statement of the law as announced in the *Price* case *supra;* that it is clear and concise and in language that would mean something to the jury. We recognize, however, that if the Court's charge adequately covered the same matter, that the Court had the right to choose between its own language and that submitted by the defendant. We think, however, it is apparent that the Court's three instructions are not adequate, are confusing and misleading and inconsistent. If that be so, the defendant was entitled to an instruction as proposed by him, or at least one substantially in that language.

Defects in the Court's instructions are several. In No. 1 the last paragraph advises the jury that a loaded gun is a dangerous weapon. It does not, however, advise them that if it is not loaded it is not a dangerous weapon. In fact, nowhere in these instructions is the jury told, except by vague indirection, that if the gun

was unloaded there could be no crime of assault with a dangerous weapon. The nearest the Court comes to making this clear is in the following language from its Instruction No. 3:

> "Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, *you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.*"

We have italicized the last few words of this quoted part to point out the confusion in this instruction. Of what should the jury find the defendant guilty, assault with a dangerous weapon or simple assault? The first portion of the quoted part implies that the jury must find *affirmatively* that the revolver was not loaded. The real test of course is whether or not they were convinced beyond a reasonable doubt that it was loaded. The effect of this unfortunate language is to shift the burden from the Government to the defendant on the vital issue as to whether or not the gun was in fact loaded.

Sub-division (c) of this Assignment of Error raises the issue of the Court's failure to instruct on circumstantial evidence. The Court failed to give any instruc-

tion on circumstantial evidence (Tr. 12 to 22). It is true that no request for such an instruction was made. However, on a matter as vital as was this, the Court will consider such error even in the absence of a request.

This Court said so in *Samuel vs. U. S.*, 169 Fed. (2) 787, at 792 in this language:

> "In a criminal case the Court must instruct on all essential questions of law involved, whether or not it is requested to do so. (Citing case)"

The same rule is announced by this Court in *Morris vs. U. S.*, 156 Fed. (2) 525, at page 527 as follows:

> "It is our opinion that the Trial Court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial covering this claimed error, but we consider it because, as is well stated in *Subay vs. United States*, 10 Cir., 1938, 95 F.2d 890. 893, '* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the Trial Court in any form.' In a criminal case, it is always a duty of the Court to instruct on all essential questions of law, whether requested or not. (Citing cases)."

Was an instruction on circumstantial evidence essential in this case? We think it is, obviously. We emphasize this error because the most vital element in the case was whether or not the gun was loaded. In

other words, whether or not the defendant was guilty of the aggravated assault or the lesser, included crime of simple assault. The determination of that issue depended entirely upon circumstantial evidence—giving the prosecution the benefit of the most favorable consideration of all the evidence. There was no direct evidence that the gun was loaded. The only circumstantial evidence on that point was the testimony of Dr. O'Malley. (We do not concede of course that his testimony was in any way properly admitted, but if it were, at most, it was circumstantial, and very thin at that.)

So the case was submitted to the jury without any instruction or guide as to how it may or could consider and analyze circumstantial evidence. We believe it strains all reason to conclude that from the doctor's testimony the jury could infer circumstantially that the gun was loaded when the assault was committed. Was this testimony consistent with the other testimony? Was it consistent with every reasonable hypothesis of guilt? Was it inconsistent with every reasonable hypothesis of innocence? Perhaps a jury could have answered each of these questions affirmatively, but at least it should have been advised that it must do so in order to resolve the circumstances in favor of a conclusion that the gun was loaded. Without such advice the jury had no device by which to measure

those circumstances and was left entirely to its own conjecture and speculation.

CONCLUSION

From the foregoing, we think it is demonstrated that by a series of errors, i.e.:

1. The admission of testimony of witnesses that they *thought* the gun was loaded;

2. The admission of Dr. O'Malley's testimony;

3. The refusal to give the defendant's requested instruction;

4. The Court's failure to adequately instruct on the distinction between assault with a dangerous weapon and simple assault;

5. The Court's failure to instruct on circumstantial evidence; and

6. The Court's failure to withdraw from the jury the crime charged, for lack of evidence;

all bearing heavily on the only crucial issue in the case, the result was an unfair trial prejudicial to defendant.

Respectfully submitted,

HENDERSON, CARNAHAN, THOMPSON & GORDON
HARRY SAGER,
Attorneys for Appellant.